

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRASS,

Plaintiff,

v.

THE STATE OF NEVADA EX REL THE
NDOC, *et al.*

Defendants.

Case No. 2:21-cv-00074-RFB-VCF

**ORDER SCREENING FIRST AMENDED
COMPLAINT AND RESOLVING SOME
PENDING MOTIONS**

I. INTRODUCTION

Before the Court are Defendants' Motion to Dismiss (ECF No. 28), Plaintiff's Motion for Leave to Amend (ECF Nos. 29, 31), Plaintiff's Motion for an Emergency Hearing (ECF No. 32), Plaintiff's Motion for Temporary Restraining Order (ECF No. 34), Plaintiff's Motion for Preliminary Injunction (ECF No. 35), and Defendants' Motion to Extend Time (First Request) (ECF No. 36).

It appears that Plaintiff filed the motion for leave to amend in response to Defendants' Motion to Dismiss. The Court grants the motion for leave to amend and screens the superseding amending pleading submitted as part of Plaintiff's response. Accordingly, Plaintiff's motions for injunctive relief and request for an emergency hearing are denied without prejudice, and Defendants' motions to dismiss and to extend time are denied as moot.

II. PROCEDURAL BACKGROUND

Plaintiff, who is incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), initiated this action by filing a civil rights complaint pursuant to 42 U.S.C. § 1983 on

1 January 14, 2021. ECF No. 1-1. Plaintiff also filed a motion for appointment of counsel, ECF No.
 2 18, and Defendants filed a motion to vacate a minute order, ECF No. 23. Plaintiff paid the filing
 3 fee in full. ECF No. 6. On July 2, 2021, the Court issued a screening order and directed the Clerk
 4 of the Court to file the Complaint. ECF Nos. 11, 12. The Court dismissed the Complaint without
 5 prejudice and ordered Plaintiff to file an amended complaint within 45 days. ECF No. 11. On July
 6 22, 2021, Plaintiff filed a motion to extend time to file an amended complaint, ECF No. 14, and
 7 on December 28, 2021, the Court granted the motion, ECF No. 22.

8 On December 22, 2021, Plaintiff filed motions for a temporary restraining order and a
 9 preliminary injunction, contending that he was not getting medical treatment that was ordered,
 10 including surgery for his hand, and follow up medical treatment for back surgery. ECF Nos. 19,
 11 20. On December 28, 2021, the Court, having dismissed Plaintiff's Complaint without prejudice,
 12 and Plaintiff having yet to file an amended complaint, denied the motions without prejudice
 13 because there was no operative complaint to assess Plaintiff's motions. ECF No. 22. The Court
 14 noted that Plaintiff could refile the motions after he filed the amended complaint pursuant to its
 15 July 2, 2021 order. Id. The Court gave Plaintiff until February 2, 2022, to file an amended
 16 complaint. Id. Plaintiff did not file an amended complaint on February 2, 2022.

17 On April 7, 2022, the Court vacated the July 2, 2021 screening order, rescreened the
 18 Complaint under 28 U.S.C. § 1915A, and addressed the motions. ECF No. 26. Based upon the
 19 record in the case, the Court concluded rescreening was appropriate. Id. The Court found that
 20 Plaintiff's Complaint alleged sufficient facts for colorable deliberate indifference claims on all
 21 three claims against Defendant Charles Daniels for injunctive relief and Doe medical and nursing
 22 directors of Nevada Department of Corrections ("NDOC") and High Desert State Prison ("HDSP")
 23 and Doe members of the NDOC Utilization Review Panel. Id.¹ The Court noted that, "[i]f the true
 24 identity of any of the Doe Defendant(s) [came] to light during discovery, Plaintiff [could] move to
 25 substitute the true names of Doe Defendant(s) to assert claims against the Doe Defendant(s) at that
 26 time." ECF No. 26 at 7. Plaintiff's Complaint also indicated that he would "need to amend or

27
 28 ¹ The Court's April 7, 2022 Order also denied as moot Defendants' Motion to Vacate and denied without
 prejudice Plaintiff's Motion for Appointment of Counsel. It also dismissed the State of Nevada with prejudice. ECF
 No. 26.

1 supplement this Complaint once the true names, titles, and other identifying information and
2 relevant facts are learned through discovery or other means.” ECF No. 12 at 2.

3 On June 6, 2022, Defendants filed a motion to dismiss Plaintiff’s Complaint for failure to
4 state a claim upon which relief could be granted. ECF No. 28. Plaintiff responded on June 17,
5 2022, and Defendants replied on June 24, 2022. ECF Nos. 29, 30. Additionally, Plaintiff filed a
6 “REPLY re (unspecified) Motion for Leave to Amend.” ECF No. 31. In that filing, Plaintiff
7 attached a “First Amended Civil Rights Complaint Pursuant to 42 U.S.C. § 1983,” contending that
8 “Defendants do not oppose Brass’s Motion for Leave to Amend[, and] therefore Brass’s Motion
9 for Leave to Amend should be granted.” Id.

10 Separately, on September 16, 2022, Plaintiff filed a “Motion for an Emergency Hearing re:
11 Plaintiff’s medical condition,” contending that he was not getting medical treatment for “skin
12 lesions, discoloration, and pox like sores.” ECF No. 32. On October 10, 2022, Plaintiff filed new
13 motions for a temporary restraining order and a preliminary injunction. ECF Nos. 34, 35. On
14 October 24, 2022, Defendants filed a motion to extend time to respond to the newly filed motions
15 for injunctive relief. ECF No. 36.

16 The Court finds that Plaintiff filed a motion for leave to amend in response to Defendants’
17 Motion to Dismiss. Accordingly, the Court addresses the motion for leave to amend and finds
18 screening the superseding amending pleading submitted as part of Plaintiff’s response to be
19 appropriate. The Court also addresses Plaintiff’s motions for injunctive relief and request for an
20 emergency hearing, as well as Defendants’ motion to dismiss and motion to extend time.

21 22 **III. MOTION FOR LEAVE TO AMEND THE COMPLAINT**

23 Federal Rule of Civil Procedure 15(a) provides that a trial court shall grant leave to amend
24 freely “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “[T]his policy is to be applied with
25 extreme liberality.” Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir.
26 1990); see also Waldrip v. Hall, 548 F.3d 729, 732 (9th Cir. 2008). The “rule favoring liberality
27 in amendments to pleadings is particularly important for the pro se litigant.” Lopez v. Smith, 203
28 F.3d 1122, 1131 (9th Cir. 2000). This liberality, though, “is subject to several limitations. Those

1 limitations include undue prejudice to the opposing party, bad faith by the movant, futility, and
 2 undue delay.” Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir.
 3 2011) (citations marks omitted); see also Waldrip, 548 F.3d at 732.

4 “[A] district court should grant leave to amend even if no request to amend the pleading
 5 was made, unless it determines that the pleading could not possibly be cured by the allegation of
 6 other facts.” Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995); see also Cook, Perkiss &
 7 Liehe, Inc. v. N. California Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990) (“We have
 8 held that in dismissals for failure to state a claim, a district court should grant leave to amend even
 9 if no request to amend the pleading was made, unless it determines that the pleading could not
 10 possibly be cured by the allegation of other facts. Therefore, it is of no consequence that [plaintiff]
 11 did not file a formal motion, accompanied by a proposed amendment, requesting leave to amend.”
 12 (citations omitted)).

13 Coupled with his Response to the Defendants’ Motion to Dismiss, Plaintiff’s supplemental
 14 Reply to Defendants’ own Reply was inappropriately filed as an unauthorized amended complaint,
 15 rather than a true response. Fed. R. Civ. P. 15(a); see also Sudduth v. Citimortgage, Inc., 79 F.
 16 Supp. 3d 1193, 1198 n.2 (D. Colo. 2015) (“Plaintiffs cannot amend their complaint by adding
 17 factual allegations in response to Defendants . . . motion to dismiss.”). The Court, acknowledging
 18 this procedural error, liberally construes Plaintiff’s Response and supplemental Reply as a Motion
 19 to Amend, i.e. a Proposed First Amended Complaint. Castro v. United States, 540 U.S. 375, 381-
 20 82 (2003) (Courts may construct pro se filings in a way that “create[s] a better correspondence
 21 between the substance of a pro se motion’s claim and its underlying legal basis.”).

22 Here, Plaintiff’s First Amended Complaint (“FAC”) names additional parties, including
 23 medical and nursing directors, physicians, and nurse practitioners of NDOC and HDSP. Under
 24 Claims 1, 2, and 3, the FAC alleges how these named individuals violated his rights under the
 25 Eighth Amendment by denying him certain treatment for his specific ailments. Given the current
 26 stage of this case, the Court does not find that any limitations counsel against granting Plaintiff’s
 27 motion for leave to amend, including any “undue prejudice to the opposing party, bad faith by the
 28 movant, futility, [or] undue delay.” Cafasso, 637 F.3d at 1058.

The Court also notes that Plaintiff is only seeking to amend his complaint to add the names of defendants and to further specify which of those named defendants his claims apply to and does not additional claims. Further, Defendants' Reply to Plaintiff's Response to the Motion to Dismiss does not address Plaintiff's argument that leave to amend should be granted, nor did Defendants attempt to separately respond to Plaintiff's "REPLY re (unspecified) Motion for Leave to Amend" in opposition. See Rogers Enterprises, Inc. v. Hitachi Sols. Am., Ltd., No. 19-cv-1913-PSG-JDEX, 2022 WL 1410000, at *12 (C.D. Cal. Jan. 18, 2022) ("Defendant fails to respond to any of Plaintiff's arguments . . . and thus concedes these issues."). Moreover, before the Court rescreened Plaintiff's Complaint, it gave Plaintiff the opportunity to file an amended complaint. While Plaintiff did not timely file an amended complaint within time frame ordered, the Court ultimately rescreened Plaintiff's original Complaint and allowed Claims 1, 2, and 3 to proceed.² Plaintiff is, however, warned that any future filings, including supplemental filings, must be filed pursuant to the Local Rules, see Local Rule IA 7-2(a), (g), and if Plaintiff requires an extension of time, he must also file a motion pursuant to Local Rule IA 6-1.

Accordingly, the Court will grant the motion for leave to amend and now screens the FAC.

IV. SCREENING THE AMENDED COMPLAINT

a. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See id. §§ 1915A(b)(1), (2). Pro se pleadings, however, must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United

² The Court's basis for ordering Plaintiff to file an amended complaint was because its original screening order dismissed the original Complaint without prejudice.

1 States; and (2) that the alleged violation was committed by a person acting under color of state
2 law. West v. Atkins, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, under the Prison Litigation
4 Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s claim if “the
5 allegation of poverty is untrue” or if the action “is frivolous or malicious, fails to state a claim on
6 which relief may be granted, or seeks monetary relief against a defendant who is immune from
7 such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon
8 which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the
9 Court applies the same standard under § 1915 when reviewing the adequacy of a complaint or an
10 amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should be
11 given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear
12 from the face of the complaint that the deficiencies could not be cured by amendment. Cato v.
13 United States, 70 F.3d 1103, 1106 (9th Cir. 1995).

14 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See Chappel v.
15 Lab. Corp. of Am., 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is
16 proper only if it the plaintiff clearly cannot prove any set of facts in support of the claim that would
17 entitle him or her to relief. Id. at 723-24. In making this determination, the Court takes as true all
18 allegations of material fact stated in the complaint, and the Court construes them in the light most
19 favorable to the plaintiff. Warshaw v. Xoma Corp., 74 F.3d 955, 957 (9th Cir. 1996). Allegations
20 of a pro se complainant are held to less stringent standards than formal pleadings drafted by
21 lawyers. Hughes v. Rowe, 449 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not
22 require detailed factual allegations, a plaintiff must provide more than mere labels and conclusions.
23 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of
24 a cause of action is insufficient. Id.

25 Additionally, a reviewing court should “begin by identifying [allegations] that, because
26 they are no more than mere conclusions, are not entitled to the assumption of truth.” Ashcroft v.
27 Iqbal, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the framework of a
28 complaint, they must be supported with factual allegations.” Id. “When there are well-pleaded

1 factual allegations, a court should assume their veracity and then determine whether they plausibly
 2 give rise to an entitlement to relief. Id. “Determining whether a complaint states a plausible claim
 3 for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial
 4 experience and common sense.” Id.

5 Finally, all or part of a complaint filed by a person incarcerated may be dismissed sua
 6 sponte if that person’s claims lack an arguable basis either in law or in fact. This includes claims
 7 based on legal conclusions that are untenable—like claims against defendants who are immune
 8 from suit or claims of infringement of a legal interest that clearly does not exist—as well as claims
 9 based on fanciful factual allegations like fantastic or delusional scenarios. Neitzke v. Williams,
 10 490 U.S. 319, 327-28 (1989).

11 **b. SCREENING OF THE FAC**

12 In the FAC, Plaintiff sues multiple defendants for events that took place while Plaintiff was
 13 incarcerated at HDSP. ECF No. 31 at 4. Plaintiff sues Defendants State of Nevada ex rel NDOC,³
 14 NDOC Director Charles Daniels, HDSP physicians Gregory Bryant, Wilson Bernales, and David
 15 Rivas, NDOC Medical Director Michael Minev, HDSP Nursing Director Benjamin Gutierrez,⁴
 16 Nurse Practitioner Rio, Nurse Practitioner Martin, HDSP medical case manager Jaymie Cabrera,
 17 Adrienne Thompson, HDSP charge nurse Nilo Peret,⁵ HDSP registered nurse Nick Parsons, and
 18 Does. Id. at 4-7. Plaintiff alleges three claims and seeks monetary, injunctive, and declaratory
 19 relief. See id. at 11, 14, 16, 19.

20 **i. Claim 1**

21 In Claim 1, Plaintiff alleges the following: In March 2019, Plaintiff started experiencing
 22 pain in his back and neck and started having difficulty performing daily tasks. Id. at 11. As his
 23 pain grew worse, he started to file medical grievances. Id. On March 19, 2020, prison officials
 24

25 ³ The Court already dismissed Defendant State of Nevada ex rel Nevada Department of Corrections with
 26 prejudice, therefore it does not address any claims alleged against it in this screening order.

27 ⁴ Defendant Gutierrez is responsible for all aspects of nursing at HDSP, including staffing supervision and
 also responds or assigns, for response, medical requests for treatment or kite grievances.

28 ⁵ Defendant Peret supervises HDSP’s nursing staff and provides direct care to inmates in all forms as well as
 assists with responding to kites, grievances, and in person requests.

1 took Plaintiff to Valley Hospital. Id. The employees there ordered an MRI to diagnose Plaintiff's
2 condition. Id. On April 19, 2020, Defendants stopped issuing Baclofen to Plaintiff. Id. On April
3 20, 2020, prison officials conducted x-rays and blood tests on Plaintiff. Id. On April 24, 2020,
4 prison officials took Plaintiff to Valley Hospital and told him that he needed an MRI and a CAT
5 scan. Id. On April 29, 2020, Plaintiff called an emergency man down and prison officials took him
6 to Sunrise Hospital. Id. There was, however, no neurologist available. Id. On May 5, 2020, Plaintiff
7 called a man down and had a consultation with HDSP provider Rio. Id. at 11-12. Despite Plaintiff's
8 tests and examinations, Nurse Practitioner Rio thought Plaintiff was "feigning" his condition. Id.
9 at 12.

10 On June 2, 2020, someone conducted an MRI on Plaintiff's head, cervical spine, and
11 lumbar region. Id. On June 15, 2020, Defendants Bryant, Bernales, and Rivas drew Plaintiff's
12 blood at HDSP and discontinued his muscle relaxer medications. Id. On June 23, 2020, Plaintiff
13 met with Nurse Practitioner Rio and discussed the MRI results which showed a compressed spine.
14 Id.

15 On July 17, 2020, Plaintiff completed and submitted a pre-surgical packet. (Id.) On July
16 29, 2020, prison officials transported Plaintiff to a surgical consult at Valley Hospital which was
17 cancelled. Id.

18 On August 10, 2020, Plaintiff had to complete a new packet for surgery with a different
19 surgeon. Id. On August 13, 2020, prison officials transported Plaintiff late to the surgical consult
20 "which was cancelled." Id. On August 14, 2020, someone approved Plaintiff for surgery. (Id.)
21 Plaintiff initiated written and oral inquiries to Defendants Cabrera, Gutierrez, Peret, Parsons, and
22 Bryant as to why he had not been sent out for surgery. Id.⁶

23 On October 12, 2020, Plaintiff received physical therapy. Id. On October 21, 2020, Plaintiff
24 was taken to a hand specialist who found that Plaintiff had nerve damage in both hands, had carpal
25 tunnel, and needed surgery. Id. Plaintiff once more initiated written and oral inquiries to
26

27 ⁶ According to the FAC, Defendants Parsons, Peret, and Gutierrez are responsible or are assigned to review
28 and respond to Plaintiff's medical kites and grievances at the informal and first level, and that Defendants Cabrera
and Thompson are responsible for medical care generally and for arranging for specialized medical care outside of the
prison.

1 Defendants Cabrera, Gutierrez, Peret, Parsons, and Bryant as to why he had not been sent out for
2 surgery or surgeries. Id.

3 On December 9, 2020, someone discontinued some of Plaintiff's medications and food to
4 prepare him for surgery in ten days. Id. Plaintiff initiated oral and written inquiries to Defendants
5 Minev, Bryant, Cabrera, and Gutierrez as to why he was not being transported for surgery or
6 surgeries. Id.

7 Plaintiff's condition continues to deteriorate, and his compressed cervical spine has
8 become worse. Id. at 13. Without intervention and treatment, Plaintiff's condition could lead to
9 paralysis. Id. Plaintiff has had numbness in his limbs and extremities; difficulty walking, moving,
10 sleeping, and sitting even for bowel movements; and has suffered from debilitating pain. Id.
11 Defendants were responsible for his pain and suffering. Id.

12 **ii. Claim 2**

13 In Claim 2, Plaintiff alleges the following: In October 2020, Plaintiff became aware of the
14 nerve damage in his hands during a consultation with a surgeon. Id. at 14. Although Plaintiff had
15 a consultation with a different surgeon in August 2020, nobody revealed his nerve damage to him.
16 Id. Defendants either intentionally concealed the results of the diagnosis or prescribed him
17 medication that would mask the condition to prevent treatment. Id. Since learning of the nerve
18 damage, Plaintiff sent requests for treatment, medications, grievances, and sought assistance from
19 Defendants Cabrera, Bryant, Minev, Gutierrez, Parsons, and Peret to determine the delay in
20 surgery. Id. The nerve damage in his hands adversely impacts his hygiene, lifting and moving
21 objects, writing, and any activity that requires him to use his hands. Id. The FAC alleges that
22 Defendants Cabrera and Bryant received Plaintiff's medical records and recommendations from
23 outside specialist and discussed them at NDOC Utilization Review Panel meetings with Defendant
24 Minev, but that they all took no action based on them. Id. at 15. Moreover, Plaintiff's kites,
25 grievances, and discussions with Defendants Parsons, Nurse Practitioner Rio, Nurse Practitioner
26 Martin, and Peret put them, as well as Defendants Bryant, Minev, and Cabrera on notice of
27 Plaintiff's medical conditions yet failed to provide him with any medical care. Id.

28 //

iii. Claim 3

In Claim 3, Plaintiff alleges the following: Plaintiff had been prescribed medications, diagnostic tests, therapies, and had been approved for surgeries for both conditions. Id. at 16. Prior to being referred to outside specialists, someone was prescribing Plaintiff muscle relaxers and other medications which Defendants Bryant, Bernales, Rivas, and others denied, delayed, or permitted to run out or expire. Id. This caused him pain and suffering. Id. Defendants Parsons, Peret, Gutierrez, and Minev either denied, delayed, or failed to respond to Plaintiff's grievances. Id. Since September 2, 2020, Plaintiff has not received Lyrica. Id. at 17. Plaintiff also stopped receiving Baclofen. Id. Defendants were aware of Plaintiff's serious medical conditions. Id. Defendants Cabrera and Thompson failed to obtain approval or schedule follow ups for these medical conditions. Id. Defendants Bryant, Bernales, and Rivas allowed Plaintiff's medications and treatment to expire putting Plaintiff in great risk. Defendants Parsons, Peret, and Gutierrez ignored, delayed, or denied kites and grievances. Id. Defendant Minev also ignored Plaintiff's kites and grievances and failed to intervene leading to Plaintiff's alleged harm. Id.

c. Analysis of the Claims

Plaintiff alleges claims for Eighth Amendment deliberate indifference to serious medical needs for his compressed spine (Claim 1), the nerve damage to his hands (Claim 2), and failure to provide medications and recommended care (Claim 3). Id. at 11, 14, 16.

A plaintiff cannot recover money damages from state officials sued in their official capacities. See Aholelei v. Dep't of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) (citations omitted). Official capacity suits may seek only prospective or injunctive relief. See Wolfson v. Brammer, 616 F.3d 1045, 1065-66 (9th Cir. 2010). In addition to being limited to prospective relief, a plaintiff pursuing defendants in their official capacities must demonstrate that a policy or custom of the governmental entity of which the official is an agent was the moving force behind the violation. See Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159, 166 (1985). Personal capacity suits, on the other hand, "seek to impose personal liability upon a government official for actions [the official] takes under color of state law." Kentucky v. Graham, 473 U.S. 159, 165 (1985). Liability in a personal-capacity suit can be demonstrated by showing

1 that the official caused the alleged constitutional injury. See id. at 166.

2 In addition, supervisory personnel are generally not liable under § 1983 for the actions of
3 their employees under a theory of respondeat superior. Taylor v. List, 880 F.2d 1040, 1045 (9th
4 Cir. 1989). When a named defendant holds a supervisory position, the causal link between him or
5 her and the claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607
6 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Plaintiff
7 must allege facts that a supervisory defendant either: personally participated in the alleged
8 deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or
9 promulgated or implemented a policy “so deficient that the policy itself is a repudiation of
10 constitutional rights and is the moving force of the constitutional violation.” Hansen v. Black, 885
11 F.2d 642, 646 (9th Cir. 1989); Taylor, 880 F.2d at 1045.

12 The Eighth Amendment prohibits the imposition of cruel and unusual punishment and
13 “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”
14 Estelle v. Gamble, 429 U.S. 97, 102 (1976). A prison official violates the Eighth Amendment when
15 he acts with “deliberate indifference” to the serious medical needs of an inmate. Farmer v.
16 Brennan, 511 U.S. 825, 828 (1994). “To establish an Eighth Amendment violation, a plaintiff must
17 satisfy both an objective standard—that the deprivation was serious enough to constitute cruel and
18 unusual punishment—and a subjective standard—deliberate indifference.” Snow v. McDaniel,
19 681 F.3d 978, 985 (9th Cir. 2012).

20 To establish the first prong, “the plaintiff must show a serious medical need by
21 demonstrating that failure to treat a prisoner’s condition could result in further significant injury
22 or the unnecessary and wanton infliction of pain.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
23 2006) (internal quotations omitted). To satisfy the deliberate indifference prong, a plaintiff must
24 show “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need and
25 (b) harm caused by the indifference.” Id. “Indifference may appear when prison officials deny,
26 delay or intentionally interfere with medical treatment, or it may be shown by the way in which
27 prison physicians provide medical care.” Id. (internal quotations omitted). When a prisoner alleges
28 that delay of medical treatment evinces deliberate indifference, the prisoner must show that the

1 delay led to further injury. See Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404,
2 407 (9th Cir. 1985) (holding that “mere delay of surgery, without more, is insufficient to state a
3 claim of deliberate medical indifference”).

4 Liberally construing the FAC for purposes of screening only, the Court finds that the First
5 Amended Complaint alleges sufficient facts for colorable deliberate indifference claims on all
6 three claims. With respect to Claim 1, Plaintiff alleges that his back pain was not treated even
7 though prison officials had knowledge and warning given Plaintiff's numerous filed grievances
8 and doctors' orders. With respect to Claim 2, Plaintiff again alleges that the pain in his hands has
9 not been adequately treated, and that defendants have ignored the prescription or recommendation
10 for surgery. With respect to Claim 3, Plaintiff alleges worsening pain because of a lack of prompt
11 or responsive treatment from prison officials who were aware of his conditions. Plaintiff was
12 prescribed medication and therapies, yet prison officials denied, delayed, or failed to respond to
13 his grievances. All three claims state colorable claims and shall proceed.

14 All three claims will also proceed against all Defendants, except Defendant Thompson.
15 This is because other than describing what Defendant Thompson's responsibility was, and that she
16 failed to obtain approval or schedule follow ups related to Plaintiff's medical conditions, the FAC
17 fails to provide any other facts that describe how Defendant Thompson violated Plaintiff's Eighth
18 Amendment rights.

19 Further, as a general matter, Defendants cannot be sued in their official capacities for
20 monetary relief. Therefore, Claim 1, Claim 2, and Claim 3, in so far as they seek monetary relief,
21 cannot proceed against Defendants in their official capacities. Accordingly, the Court will permit
22 all three claims to proceed against Defendant Charles Daniels for injunctive relief. See Colwell v.
23 Bannister, 763 F.3d 1060, 1070 (9th Cir. 2014) (holding that “a corrections department secretary
24 and prison warden were proper defendants in a § 1983 case because ‘[a] plaintiff seeking injunctive
25 relief against the State is not required to allege a named official's personal involvement in the acts
26 or omissions constituting the alleged constitutional violation. Rather, a plaintiff need only identify
27 the law or policy challenged as a constitutional violation and name the official within the entity
28 who can appropriately respond to injunctive relief.’”). Moreover, the Court will permit all three

claims to proceed against Defendants Bryant, Bernales, Rivas, Minev, Gutierrez, Cabrera, Peret, and Parsons in their official capacities only for injunctive relief and for monetary relief in their personal capacities. See Romano v. Bible, 169 F.3d 1182, 1185-86 (9th Cir. 1999); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Hansen, 885 F.2d at 646; Taylor, 880 F.2d at 1045. Lastly, the Court permits all three claims to proceed against Defendants Rio and Martin in their personal capacities for monetary relief.

V. CONCLUSION

IT THEREFORE ORDERED that Plaintiff's Response and Reply to Defendants' Motion to Dismiss (ECF Nos. 29, 31) are construed as a Motion to Amend.

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend is GRANTED. (ECF Nos. 29, 31)

IT IS FURTHER ORDERED that the First Amended Complaint (ECF No. 31) is the operative complaint, that it is docketed at ECF No. 37, and that the Clerk of Court send Plaintiff a courtesy copy.

IT IS FURTHER ORDERED that Gregory Bryant, Wilson Bernales, David Rivas, Michael Minev, Benjamin Gutierrez, Nurse Practitioner Rio, Nurse Practitioner Martin, Jaymie Cabrera, Adrienne Thompson, Nilo Peret, and Nick Parsons be included in this case as Defendants. The Clerk of the Court will add Bryant, Bernales, Rivas, Minev, Gutierrez, Rio, Martin, Cabrera, Thompson, Peret, and Parsons to the docket sheet as Defendants in this action.

IT IS FURTHER ORDERED that Defendant Adrienne Thompson is DISMISSED from the entirety of this action without prejudice.

IT IS FURTHER ORDERED that Claim 1, Claim 2 and Claim 3, alleging Eighth Amendment deliberate indifference to serious medical needs, will proceed against Defendants Charles Daniels, Gregory Bryant, Wilson Bernales, David Rivas, Michael Minev, Benjamin Gutierrez, Jaymie Cabrera, Nilo Peret, and Nick Parsons for injunctive relief. Claims 1, 2 and 3 will also proceed against Defendants Gregory Bryant, Wilson Bernales, David Rivas, Michael Minev, Benjamin Gutierrez, Nurse Practitioner Rio, Nurse Practitioner Martin, Jaymie Cabrera, Nilo Peret, and Nick Parsons for monetary relief.

1 **IT IS FURTHER ORDERED** that the Clerk of the Court shall electronically SERVE a
2 copy of this order and a copy of Plaintiff's First Amended Complaint (ECF No. 37) on the Office
3 of the Attorney General of the State of Nevada. This does not indicate acceptance of service.

4 **IT IS FURTHER ORDERED** that service must be perfected within ninety (90) days from
5 the date of this order pursuant to Fed. R. Civ. P. 4(m).

6 **IT IS FURTHER ORDERED** that subject to the findings of this order, within **twenty-**
7 **one (21) days** of the date of entry of this order, the Attorney General's Office shall file a notice
8 advising the Court and Plaintiff of: (a) the names of the defendants for whom it accepts service;
9 (b) the names of the defendants for whom it does not accept service, and (c) the names of the
10 defendants for whom it is filing the last-known-address information under seal. As to any of the
11 named defendants for whom the Attorney General's Office cannot accept service, the Office shall
12 file, under seal, but shall not serve the inmate Plaintiff the last known address(es) of those
13 defendant(s) for whom it has such information. If the last known address of the defendant(s) is a
14 post office box, the Attorney General's Office shall attempt to obtain and provide the last known
15 physical address(es).

16 **IT IS FURTHER ORDERED** that, if service cannot be accepted for any of the named
17 defendant(s), Plaintiff shall file a motion identifying the unserved defendant(s), requesting
18 issuance of a summons, and specifying a full name and address for the defendant(s). For the
19 defendant(s) as to which the Attorney General has not provided last-known-address information,
20 Plaintiff shall provide the full name and address for the defendant(s).

21 **IT IS FURTHER ORDERED** that, if the Attorney General accepts service of process for
22 any named defendant(s), such defendant(s) shall file and serve an answer or other response to the
23 amended complaint (ECF No. 37) within **sixty (60) days** from the date of this order.

24 **IT IS FURTHER ORDERED** that Plaintiff shall serve upon defendant(s) or, if an
25 appearance has been entered by counsel, upon their attorney(s), a copy of every pleading, motion
26 or other document submitted for consideration by the Court. If Plaintiff electronically files a
27 document with the Court's electronic-filing system, no certificate of service is required. Fed. R.
28 Civ. P. 5(d)(1)(B); Local Rule IC 4-1(b); Local Rule 5-1. If, however, Plaintiff mails the document

1 to the Court, Plaintiff shall include with the original document submitted for filing a certificate
2 stating the date that a true and correct copy of the document was mailed to the defendants or
3 counsel for the defendants. If counsel has entered a notice of appearance, Plaintiff shall direct
4 service to the individual attorney named in the notice of appearance, at the physical or electronic
5 address stated therein. The Court may disregard any document received by a district judge or
6 magistrate judge which has not been filed with the Clerk, and any document received by a district
7 judge, magistrate judge, or the Clerk which fails to include a certificate showing proper service
8 when required.

9 **IT FURTHER ORDERED** that Defendants' Motion to Dismiss (ECF No. 28) the
10 Complaint is DENIED as moot.

11 **IT IS FURTHER ORDERED** that Plaintiff's Motion for an Emergency Hearing (ECF
12 No. 32) is DENIED.

13 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Temporary Restraining Order
14 (ECF No. 34) and Motion for Preliminary Injunction (ECF No. 35) are DENIED without prejudice.
15 Plaintiff may refile a Motion for Preliminary Injunction and/or Motion for Temporary Restraining
16 Order after the operative amended complaint is docketed at ECF No. 37 so that the Court may
17 properly assess such motions.

18 **IT IS FURTHER ORDERED** that Defendants shall file under seal Plaintiff's complete
19 medical records by November 28, 2022 and shall also provide Plaintiff with a copy of his complete
20 medical records in his cell by that date.

21
22 **DATED:** November 17, 2022



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24 **RICHARD F. BOULWARE, II**
25 **UNITED STATES DISTRICT JUDGE**
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